(11) (9)

Nos. 04-1244 and 04-1352

Supreme Court, U.S.
FILED
SEP 2 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *et al.*,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Respondents.

OPERATION RESCUE,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The American Federation of Labor and Congress of Industrial Organizations, a federation of 53 national and international labor organizations with a total membership of 9 million working men and women, files this brief *amicus curiae* in support of Petitioners with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Hobbs Act, as codified in 18 U.S.C. § 1951, sets out in § 1951 (a)'s three clauses, three interrelated federal "robbery or extortion" criminal violations:

> *First*, to "obstruct[], delay[] or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion";
>
> *Second*, to "attempt[] or conspire[]" to obstruct, delay or affect commerce or the movement of any article or commodity in commerce by robbery or extortion; and
>
> *Third*, to "commit[] or threaten[] physical violence to any person or property in furtherance of a plan or purpose" to obstruct, delay or affect commerce or the movement of any article or commodity in commerce by robbery or extortion.

That is plain from the language of 18 U.S.C. § 1951, which was enacted by the 80th Congress as part of the 1948 Act to Revise and Codify Title 18 of the United States Code. And, it is confirmed by the 1946 Hobbs Act's original statutory language enacted by the 79th Congress as Public Law 486, 60 Stat. 420 (1946)—statutory language the 1948 recodification tracked and consolidated without any intent to effect any substantive change in the Hobbs Act's scope or nature.

The Seventh Circuit's proposal to expand the Hobbs Act's third—"physical violence"—clause to reach physical violence not related to robbery or extortion cannot be squared with the language of 18 U.S.C. § 1951(a). What is more, as the Seventh Circuit conceded, its proposal is contrary to and would override the plain meaning of the 1946 Hobbs Act—the source for 18 U.S.C. § 1951(a). And, contrary to that court's claim, the Seventh Circuit's proposal is not necessary in order to save 18 U.S.C. § 1951(a)'s third—"physical violence"—clause from being redundant of the first two clauses in that section. In addition, the Seventh Circuit's approach is

inconsistent with this Court's approach in prior decisions construing the Hobbs Act.

Simply stated, the Seventh Circuit's proposal to expand the Hobbs Act's reach beyond "robbery or extortion" is wrong on every score.

ARGUMENT

The Hobbs Act, 18 U.S.C. § 1951, extends the federal criminal law to reach "robbery or extortion" that "affects commerce" in all its guises. That Act does not extend the federal criminal law further in order to reach "physical violence" that is *not* related to "robbery or extortion." That is plain from the language of 18 U.S.C. § 1951, which was enacted by the 80th Congress as part of the 1948 Act to Revise and Codify Title 18 of the United States Code. And, it is confirmed by the 1946 Hobbs Act's original statutory language enacted by the 79th Congress as Public Law 486, 60 Stat. 420—statutory language the 1948 recodification tracked and consolidated without any intent to effect any substantive change in the Hobbs Act's scope or nature.

1. Section 1951(a)—the Hobbs Act's operative provision—states:

> "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."[2]

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[2] Subsection (b), in its turn, defines the terms "robbery", "extortion" and "commerce" as those terms are used in subsection (a). 18 U.S.C. § 1951(b). And, subsection (c), adds that the Act does not "repeal, modify or affect" various other statutory provisions. 18 U.S.C. § 1951(c).

Section 1951(a) is composed of three grammatically parallel substantive clauses, each delineating one of three interrelated federal "robbery or extortion" criminal violations:

> *First*, to "obstruct[], delay[] or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion";
>
> *Second*, to "attempt[] or conspire[]" to obstruct, delay or affect commerce or the movement of any article or commodity in commerce by robbery or extortion; and
>
> *Third*, to "commit[] or threaten[] physical violence to any person or property in furtherance of a plan or purpose" to obstruct, delay or affect commerce or the movement of any article or commodity in commerce by robbery or extortion.

With respect to the third of these criminal violations—the only one now at issue in this case—the operative statutory language is "commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." The pivotal phrase in the foregoing is "to do anything in violation of this section." In order to determine whether someone is "do[ing] anything in violation of this section," it is necessary to refer to the "violations" defined in the preceding clauses of § 1951(a). And, those violations are: i) "obstruct[ing], delay-[ing] or affect[ing] commerce or the movement of any article or commodity in commerce, by robbery or extortion"; and ii) "attempt[ing] or conspir[ing] so to do."

Thus, neither of § 1951(a)'s first two clauses makes it a federal crime to "obstruct[], delay[] or affect[] commerce or the movement of any article or commodity in commerce" in any manner other than through "robbery or extortion." It follows that someone who "commits or threatens physical violence to any person or property in furtherance of a plan or purpose to" obstruct, delay or affect commerce through some means other than "robbery or extortion" cannot be said to

have acted "in furtherance of a plan or purpose to do anything in violation of this section."

In this regard, "[t]he statutory language is clear: A person may violate the Hobbs Act by committing or threatening a violent act against person or property, but only if it is in furtherance of a plan to interfere with commerce *by extortion or robbery*." *United States v. Yankowski*, 184 F.3d 1071, 1073 (9th Cir. 1999). *Accord United States v. Kennedy*, 133 F.3d 53, 57 (D.C. Cir. 1998) ("The Hobbs Act thus prohibits interference with interstate commerce through either robbery or extortion.").

2. (a) The foregoing reading of 18 U.S.C. § 1951(a) is confirmed by the language of the statutory source of that provision, the 1946 Hobbs Act enacted as Public Law 486, 60 Stat. 420.

The operative language of the 1946 Hobbs Act is contained in the following sections from title I of that statute:

> "Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> "Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> "Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> "Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a

plan or purpose to do anything in violation of section 2 shall be guilty of a felony." 60 Stat. 420.[3]

Congress could not have been any clearer in framing the four federal criminal violations established by the 1946 Hobbs Act.

To begin with, title I, section 2 states the basic violation by making it a federal crime to "obstruct[], delay[], or affect[] commerce, or the movement of any article or commodity in commerce, by robbery or extortion."

Then, having stated the basic violation in section 2—*viz.*, affecting commerce by robbery or extortion—the 1946 Act goes on in sections 3, 4 and 5 to delineate three other crimes, each related to the basic violation stated in section 2:

- Section 3 makes it a federal crime to "conspire[] with another or with others, or act[] in concert with another or with others to do anything in violation of section 2 [*viz.*, anything to affect commerce by robbery or extortion]."

- Section 4 makes it a federal crime to "attempt[] or participate[] in an attempt to do anything in violation of section 2 [*viz.*, anything to affect commerce by robbery or extortion]."

- Section 5 makes it a federal crime to "commit[] or threaten[] physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 [*viz.*, anything to affect commerce by robbery or extortion]."

Given the extraordinary care Congress took to precisely delineate each of these separate federal crimes, even the Seventh Circuit was forced to acknowledge that the 1946

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[3] Section 1 of title I defined the terms "commerce," "robbery," and "extortion." Section 6 of title I stated the penalty for violating sections 2-5. And, title II stated that nothing in the Hobbs Act should be construed to modify the Clayton, Norris-LaGuardia, Railway Labor and National Labor Relations Acts.

Hobbs Act "explicitly linked the 'acts of physical violence' clause to the prohibition on robbery and extortion." Pet. App. 15a.[4]

The legislative materials confirm that the 1946 Hobbs Act's statutory language accurately reflects Congress's intent.

The Hobbs Act originated in the House Committee on the Judiciary as H.R. 32, 79th Cong., 1st Sess. (1945). The Committee Report explains that the basic purpose of the bill, as stated in its title I, section 2, is "to prevent interference with interstate commerce by robbery or extortion." H. R. Rep. No. 238, 79th Cong. 1st Sess. 1 (1945). The House Report further explains that, in addition, the bill reaches, in title I, sections 3, 4 and 5, conspiracy or attempt to do anything to affect commerce by robbery or extortion as well as the commission or threat of violence in the furtherance of a plan to affect commerce by robbery or extortion:

> "The objective of title I is to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion as defined in the bill. A conspiracy or attempt to do anything in violation of section 2 [making robbery and extortion affecting commerce a federal felony] is likewise made punishable, as is the commission or threat of physical violence to any person or property in furtherance of a plan to violate section 2." *Id.* at 9.

The Senate Committee on the Judiciary "report[ed] the [House] bill to the Senate favorably, without amendment, and recommend[ed] that the bill do pass." S. Rep. No. 1516, 79th Cong., 2d Sess., 1 (1946). And, the Senate Report explained the bill in precisely the same terms as the House Report. *Ibid.*

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[4] "Pet. App." references in this brief are to the appendix to the petition for certiorari in case no. 04-1244.

(b) Sections 2 through 5 of the 1946 Hobbs Act were initially codified as 18 U.S.C. §§ 420a through 420d (1946 ed.). Section 420a tracked the language of section 2 of the 1946 Act exactly. Sections 420b, 420c and 420d tracked the language of sections 3, 4 and 5 of the 1946 Act exactly, with the exception that in each code section the original reference to "section 2" was changed to a reference to "section 420a of this title."

In 1948, 18 U.S.C. §§ 420a-420d were combined into the present 18 U.S.C. § 1951(a) as part of the general recodification of Title 18 of the United States Code. The question then becomes whether the 1948 recodification of the 1946 Hobbs Act worked any substantive change in—indeed a major expansion of—the Act's reach. It could not be clearer that the answer is "no."

In the first place, a comparison of the 1946 Hobbs Act's title I, sections 2-5 as initially codified in 18 U.S.C. §§ 420a-420d and the 1948 recodification's 18 U.S.C. § 1951(a) shows that the sole office of the latter is to consolidate the four operative sections of the 1946 Act into a single more succinct section which tracks the exact substance of the 1946 Act.

The first clause of § 1951(a) tracks the language of section 2 of the 1946 Hobbs Act word for word. *Compare* 18 U.S.C. § 1951(a) ("Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . .") *with* 18 U.S.C. § 420a (1946 ed.) ("Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion . . . .").[5]

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[5] Section 2 of the Hobbs Act as enacted in 1946 and as codified at 18 U.S.C. 420a contained an arguable grammatical error in that it set off the phrase "or the movement of any article or commodity in commerce"

The second clause of § 1951(a) states in a single phrase the conspiracy and attempt crimes stated in title I, sections 3 and 4 of the 1946 Hobbs Act. *Compare* 18 U.S.C. § 1951(a) ("attempts or conspires so to do") *with* 18 U.S.C. § 420b (1946 ed.) ("conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 420a of this title [section 2 of the Act]") & 18 U.S.C. § 420c (1946 ed.) ("attempts or participates in an attempt to do anything in violation of section 420a of this title [section 2 of the Act]").

And, the third clause in § 1951(a) tracks the language of title I, section 5 of the 1946 Hobbs Act with one difference. *Compare* 18 U.S.C. § 1951(a) ("commits or threatens physical violence to any person or property in furtherance of a plan to do anything in violation of this section") *with* 18 U.S.C. § 420d (1946 ed.) ("commits or threatens physical violence to any person or property in furtherance of a plan to do anything in violation of section 420a of this title [section 2 of the Act]").

The one difference between 18 U.S.C § 1951(a) and 18 U.S.C. § 420d is that the former substitutes the phrase "this section" for the original version's "section 420a of this title [section 2 of the Act]." The obvious reason for this difference is that the 1948 recodification eliminated the 1946 Hobbs Act's four separately numbered operative sections and consolidated those four sections into a single section. The self-evident point is that the referent for "violation of this section" in § 1951(a) like the referent for "violation of section 2" in section 5 of the 1946 Act is a plan to do anything to "affect commerce . . . *by robbery or extortion.*"

What is apparent on the face of § 1951(a) is confirmed by the Reviser's Notes to the 1948 recodification. These Notes

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with commas. 60 Stat. 420. The 1948 recodification corrected this error by eliminating the first comma.

were reproduced in full as an appendix to the House Report on the bill effecting the recodification. H.R. Rep. No. 304, 80th Cong., 1st Sess. (1947). The House Report explains that "[t]he reviser's notes are keyed to sections of th[e] bill and explain in detail every change made in text" to Title 18 of the U.S. Code. *Id.* at 9. And, the introduction to the appendix containing the Reviser's Notes, reiterates that the Notes "explain[] in detail the revision of each section of the Federal criminal laws." *Id.* at A1. The companion Senate Report on the recodification bill referred to the Reviser's Notes contained in the appendix to the House Report "[f]or a detailed explanation" of the recodification. S. Rep. No. 1620, 80th Cong., 2d Sess., 2 (1948).

The detailed explanation of 18 U.S.C. § 1951 contained in the Reviser's Notes states in full:

> "Section 1951—Section Revised
>
> "Based on title 18, U.S.C., 1940 ed., §§ 420a-420e-1 (June 18, 1934, ch. 569, §§ 1-6, 48 Stat. 979, 980; July 3, 1946, ch. 537, 60 Stat. 420).
>
> "Section consolidates sections 420a-420e-1 of title 18, U.S.C., 1940 ed., with changes in phraseology and arrangement necessary to effect consolidation.
>
> "Provisions designating offense as felony were omitted as unnecessary in view of definitive section 1 of this title. (See reviser's note under section 550 of this title.)
>
> "Subsection (c) of the revised section is derived from title II of the 1946 amendment. It substitutes references to specific sections of the United States Code, 1940 ed., in place of references to numerous acts of Congress, in conformity to the style of the revision bill. Subsection (c) as rephrased will preclude any construction of implied repeal of the specified acts of Congress codified in the sections enumerated.

> "The words 'attempts or conspires so to do' were substituted for sections 3 and 4 of the 1946 act, omitting as unnecessary the words 'participates in an attempt' and the words 'or acts in concert with another or with others', in view of section 2 of this title which makes any person who participates in an unlawful enterprise or aids or assists the principal offender, or does anything towards the accomplishment of the crime, a principal himself.
>
> "Words 'shall, upon conviction thereof,' were omitted as surplusage, since punishment cannot be imposed until a conviction is secured." H.R. Rep. No. 304, A131; 18 U.S.C. App. 2591-92 (1946 ed.).

"[T]he function of the Revisers of the 1948 Code was generally limited to that of consolidation and codification. Consequently, a well-established principle governing the interpretation of provisions altered in the 1948 revision is that 'no change is to be presumed unless clearly expressed.' *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957)." *Tidewater Oil Co. v. United States*, 409 U.S. 151, 162 (1972) (footnote omitted). The explanation of 18 U.S.C. § 1951 in the Reviser's Notes makes plain that the recodification of the Hobbs Act worked no substantive change in the federal criminal law as it was stated in the statutory language of the 1946 Hobbs Act.

3. Against all of that, the Seventh Circuit's only justification for straining to recast the third clause of 18 U.S.C. § 1951(a) to make it a federal crime to commit or threaten physical violence in furtherance of a plan to affect commerce in any manner is the "well-worn canon of statutory interpretation under which a court should avoid making one part of a statute meaningless." Pet. App. 14a. According to the court below, "[o]ne who commits violence in furtherance of a plan to commit robbery or extortion has either committed, attempted, or conspired to commit robbery or extortion and thus has violated the first clause, rendering the third [physical

violence] clause nugatory" if that clause is read as relating only to a plan to commit robbery or extortion. Pet. App. 13a, quoting Bradley, "*Now v. Scheidler*: RICO Meets the First Amendment," 1994 Sup. Ct. Rev. 129, 143 (1994).

But this reflects a basic misunderstanding of the criminal law. It is simply not the true that "[o]ne who commits violence in furtherance of a plan to commit robbery or extortion has either committed, attempted, or conspired to commit robbery or extortion." In order to commit "robbery or extortion," as those crimes are defined in the Hobbs Act, one must actually "obtain[] property" from the victim. 18 U.S.C. § 1951(b)(1) & (2). And, in order to "attempt" or "conspire" to commit either "robbery" or "extortion," one must act with the specific intent necessary to committing those crimes. *See* LaFave, *Substantive Criminal Law*, vol. 2, § 11.3(a), p. 211 & § 12.2(c) pp. 275-277 (2d ed. 2003) (describing the "mental state" required for the crimes of "attempt" and "conspiracy"). Thus, it is possible to "commit[] violence in furtherance of a plan to commit robbery or extortion" without committing "robbery or extortion" or conspiracy to commit "robbery or extortion" or attempted "robbery or extortion" just so long as no property changes hands and the person committing the violence is not acting with the specific intent of committing robbery or extortion.

The fact that the third crime defined by the Hobbs Act is not redundant of the first two crimes was lucidly explained by the Sixth Circuit in *United States v. Franks*, 511 F.2d 25 (1975):

> "The Hobbs Act, by the plainest of language, proscribes 'physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section.' The statute makes clear that a plan or purpose 'in violation of this section' includes a plan or purpose of 'obstruct[ing], delay[ing], or affect[ing] commerce . . . by robbery or extortion. . . .' Thus, if one

> commits physical violence affecting commerce in furtherance of a plan of obstructing, delaying or affecting commerce 'by robbery or extortion,' he has violated the Hobbs Act. * * * We construe the statute as reaching physical violence designed to culminate in extortion, even if the scheme aborts prior to extortion. Likewise, we cannot accept the . . . view that the statute proscribes all physical violence obstructing, delaying, or affecting commerce. The statute's language and legislative history require that the violence be in furtherance of a plan or purpose to obstruct, delay, or affect commerce by extortion or robbery." 511 F.2d at 31 (citation omitted).

The Seventh Circuit dismissed this reasoning with the response that "[i]t seems unlikely that Congress included the 'violence' language to capture such a tiny set of academic hypotheticals." Pet. App. 14a. That is no response at all.

In the first place, even the Seventh Circuit understands that the 1946 Congress did include the "violence language to capture such . . . hypotheticals," for that court recognized that the 1946 Hobbs Act "explicitly linked the 'acts of physical violence' clause to the prohibition on robbery and extortion." Pet. App. 15a. Moreover, the Seventh Circuit's admission that there is not a complete overlap between the "robbery or extortion" and "attempt or conspir[acy]" crimes and the "physical violence" crime—however "tiny" the gap may appear to the court below—refutes the Seventh Circuit's critical assertion that the latter is redundant of the former.

4. The Seventh Circuit's suggestion that the Hobbs Act might be read to criminalize "threatening or committing physical violence in furtherance of a plan to 'obstruct, delay, or affect commerce' (other than through robbery or extortion)," Pet. App. 8a, is also contrary to this Court's Hobbs Act decisions in *Scheidler v. NOW*, 537 U.S. 393 (2003), ("*Scheidler II*") and *United States v. Enmons*, 410 U.S. 396 (1973). In both cases, the Court took account of the fact that the defendants had "threaten[ed] or committ[ed] physical vio-

lence in furtherance of a plan to 'obstruct, delay, or affect commerce.'" Yet, in each case, the Court held that a Hobbs Act violation had not been established because the conduct in question did not involve "robbery or extortion," as those terms are defined in the Hobbs Act.

Scheidler II addressed the plaintiffs' claim that the defendants had "committed extortion under the Hobbs Act by using or threatening to use force, violence, or fear to cause [the plaintiffs] to give up property rights, namely, a woman's right to seek medical services from a clinic, the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical service free from wrongful threats, violence, coercion and fear." 537 U.S. at 401 (quotation marks omitted).

In rejecting the plaintiffs' interference-with-property-rights claim, the Court observed that "[e]liminating the requirement that property must be obtained to constitute extortion would . . . eliminate the recognized distinction between extortion and the separate crime of coercion." 537 U.S. at 405. In this regard, the Court explained that "[t]he crime of coercion, which more accurately describes the nature of [the defendants'] actions, involves the use of force or threat of force to restrict another's freedom of action." *Ibid.* That being so, in light of "Congress' decision to include extortion as a violation of the Hobbs Act and omit coercion," *id.* at 406, the Court refused to construe "the crime of extortion as set forth in the Act" in a manner that "abandoned" the "distinction between extortion and coercion" and thereby worked "a significant expansion of the law's coverage," *id.* at 409, to reach conduct that does not involve obtaining property but does involve the use of force to interfere with another's exercise of property rights.

The reasoning of *Scheidler II* leaves no room for the Seventh Circuit's expansion of the Hobbs Act's third clause in disregard of the statutory language limiting the reach of

that clause to physical violence in furtherance of a plan to affect commerce by "robbery or extortion."

Enmons involved a Hobbs Act "indictment charg[ing] that the [defendants] had conspired to use and did in fact use violence to obtain for . . . striking employees higher wages and other employment benefits from the [struck utility] Company." 410 U.S. at 398. In sustaining the dismissal of that indictment, the *Enmons* Court rejected "the theory that the [Hobbs] Act proscribes the use of force to achieve legitimate collective-bargaining demands." *Id.* at 407.

There is no question that the use of violence in support of a strike against a public utility could be fairly characterized as engaging in "physical violence in furtherance of a plan to 'obstruct, delay, or affect commerce.'" Yet, because "there ha[d] been no 'wrongful' taking of the employer's property," the *Enmons* Court held that a Hobbs Act violation had not been made out. 410 U.S. at 400. Again, the Court's reasoning leaves no room for the Seventh Circuit's expansion of the Hobbs Act's third clause.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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